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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Gregory Nidez Valencia, Jr.,
Plaintiff,

v.

Corizon, LLC,
Defendant.

No. CV 17-03632-PHX-DGC (JZB)

ORDER

Plaintiff Gregory Nidez Valencia, Jr., who is currently confined in Arizona State Prison Complex-Lewis, brought this civil rights action pursuant to 42 U.S.C. § 1983 against prison healthcare provider Corizon, LLC regarding the treatment of Plaintiff's Hepatitis C. (Doc. 1.) The parties have filed cross Motions for Summary Judgment.¹ (Docs. 19, 26.) The Court will deny Plaintiff's Motion for Summary Judgment, grant Defendant's Motion for Summary Judgment, and terminate this action.

I. Background

On screening of Plaintiff's Complaint under 28 U.S.C. § 1915A(a), the Court determined that Plaintiff stated an Eighth Amendment medical care claim and directed Defendant to answer. (Doc. 6.) Plaintiff seeks declaratory and injunctive relief and his costs of suit. (Doc. 1.)

¹ The Court provided notice to Plaintiff pursuant to *Rand v. Rowland*, 154 F.3d 952, 962 (9th Cir. 1998) (en banc), regarding the requirements of a response to Defendant's Motion. (Doc. 28.)

II. Legal Standards

A. Summary Judgment

A court must grant summary judgment “if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The movant bears the initial responsibility of presenting the basis for its motion and identifying those portions of the record, together with affidavits, if any, that it believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323.

If the movant fails to carry its initial burden of production, the nonmovant need not produce anything. *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Co., Inc.*, 210 F.3d 1099, 1102-03 (9th Cir. 2000). But if the movant meets its initial responsibility, the burden shifts to the nonmovant to demonstrate the existence of a factual dispute and that the fact in contention is material (a fact that might affect the outcome of the suit under the governing law), and that the dispute is genuine (the evidence is such that a reasonable jury could return a verdict for the nonmovant). *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 250 (1986); *see Triton Energy Corp. v. Square D. Co.*, 68 F.3d 1216, 1221 (9th Cir. 1995). The nonmovant need not establish a material issue of fact conclusively in its favor, *First Nat’l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253, 288-89 (1968), but must “come forward with specific facts showing that there is a genuine issue for trial,” *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (internal citation omitted).

At summary judgment, the judge’s function is not to weigh the evidence and determine the truth but to determine whether there is a genuine issue for trial. *Anderson*, 477 U.S. at 249. In its analysis, the court must believe the nonmovant’s evidence and draw all inferences in the nonmovant’s favor. *Id.* at 255.

B. Eighth Amendment

To prevail on an Eighth Amendment medical claim, a prisoner must demonstrate “deliberate indifference to serious medical needs.” *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir. 2006) (citing *Estelle v. Gamble*, 429 U.S. 97, 104 (1976)). There are two prongs

1 to this analysis: an objective prong and a subjective prong. As to the objective prong, a
2 prisoner must show a “serious medical need.” *Jett*, 439 F.3d at 1096 (citations omitted).
3 A “‘serious’ medical need exists if the failure to treat a prisoner’s condition could result in
4 further significant injury or the ‘unnecessary and wanton infliction of pain.’” *McGuckin*
5 *v. Smith*, 974 F.2d 1050, 1059 (9th Cir. 1992), overruled on other grounds, *WMX Techs.,*
6 *Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc) (internal citation omitted).
7 Indications that a prisoner has a serious medical need include “[t]he existence of an injury
8 that a reasonable doctor or patient would find important and worthy of comment or
9 treatment; the presence of a medical condition that significantly affects an individual’s
10 daily activities; or the existence of chronic and substantial pain.” *McGuckin*, 974 F.2d at
11 1059-60.

12 As to the subjective prong, a prisoner must show that the defendant’s response to
13 that need was deliberately indifferent. *Jett*, 439 F.3d at 1096. An official acts with
14 deliberate indifference if he “knows of and disregards an excessive risk to inmate health or
15 safety.” *Farmer*, 511 U.S. at 837. To satisfy the knowledge component, “the official must
16 both be aware of facts from which the inference could be drawn that a substantial risk of
17 serious harm exists, and he must also draw the inference.” *Id.* “Prison officials are
18 deliberately indifferent to a prisoner’s serious medical needs when they deny, delay, or
19 intentionally interfere with medical treatment,” *Hallett v. Morgan*, 296 F.3d 732, 744 (9th
20 Cir.2002) (internal citations and quotation marks omitted), or when they fail to respond to
21 a prisoner’s pain or possible medical need. *Jett*, 439 F.3d at 1096. But the deliberate-
22 indifference doctrine is limited. An inadvertent failure to provide adequate medical care
23 or negligence in diagnosing or treating a medical condition do not support an Eighth
24 Amendment claim. *Wilhelm v. Rotman*, 680 F.3d 1113, 1122 (9th Cir. 2012) (citations
25 omitted); *see Estelle*, 429 U.S. at 106 (negligence does not rise to the level of a
26 constitutional violation). Further, a mere difference in medical opinion does not establish
27 deliberate indifference. *Jackson v. McIntosh*, 90 F.3d 330, 332 (9th Cir. 1996).

1 Finally, even if deliberate indifference is shown, to support an Eighth Amendment
2 claim, the prisoner must demonstrate harm caused by the indifference. *Jett*, 439 F.3d at
3 1096; *see Hunt v. Dental Dep't*, 865 F.2d 198, 200 (9th Cir. 1989) (delay in providing
4 medical treatment does not constitute Eighth Amendment violation unless delay was
5 harmful).

6 To prevail on a claim against Corizon as a private entity serving a traditional public
7 function, Plaintiff must meet the test articulated in *Monell v. Department of Social Services*
8 *of City of New York*, 436 U.S. 658, 690-94 (1978). *Tsao v. Desert Palace, Inc.*, 698 F.3d
9 1128, 1139 (9th Cir. 2012) (applying *Monell* to private entities acting under color of state
10 law). Plaintiff must show that an official policy or custom caused the constitutional
11 violation. *Monell*, 436 U.S. at 694. To make this showing, he must demonstrate that (1) he
12 was deprived of a constitutional right; (2) Corizon had a policy or custom; (3) the policy
13 or custom amounted to deliberate indifference to Plaintiff's constitutional right; and (4) the
14 policy or custom was the moving force behind the constitutional violation. *Mabe v. San*
15 *Bernardino Cnty., Dep't of Pub. Soc. Servs.*, 237 F.3d 1101, 1110-11 (9th Cir. 2001).
16 Further, if the policy or custom in question is an unwritten one, the plaintiff must show that
17 it is so "persistent and widespread" that it constitutes a "permanent and well settled"
18 practice. *Monell*, 436 U.S. at 691 (quoting *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,
19 167-68 (1970)). "Liability for improper custom may not be predicated on isolated or
20 sporadic incidents; it must be founded upon practices of sufficient duration, frequency and
21 consistency that the conduct has become a traditional method of carrying out policy."
22 *Trevino v. Gates*, 99 F.3d 911, 918 (9th Cir. 1996).

23 **III. Facts**

24 **A. Defendant's Hepatitis C Treatment Policies**

25 Defendant follows the recommendations set forth in the Bureau of Prisons' Clinical
26 Guidance Manual—Evaluation and Management of Chronic Hepatitis C Virus (HCV)
27 Infection ("BOP Manual"). (Doc. 22 (Pl.'s Statement of Facts) ¶ 12.) The BOP Manual,
28 adopted by the Arizona Department of Corrections (ADC) and Corizon, "contains a

1 comprehensive framework for prioritizing prisoners for HCV treatment so that *those with*
2 *the greatest need* are identified and treated first.” (Doc. 25 (Def.’s Separate Statement of
3 Facts) ¶ 6 (emphasis in original).) According to a report by Gilead Science (“Gilead
4 Report”), the challenges facing prisons in treating prisoners infected with HCV include
5 budgetary constraints, the high cost of treatment, and the fact that prisoner are up to thirteen
6 times more likely to have detectable levels of HCV in the blood than the general population.
7 (*Id.* ¶ 5.) The ADC’s “Clinical Practice Guidelines for the Prevention and Treatment for
8 Viral Hepatitis C (2017)” estimates that approximately 23% of ADC inmates are infected
9 with HCV. (*Id.* ¶ 21.)

10 Progression from chronic HCV infection to fibrosis—and eventually, cirrhosis—
11 may take years in some patients, decades in others, or may not occur at all. (*Id.* ¶ 7.) Most
12 complications from HCV infection occur in people with cirrhosis. Therefore, assessing for
13 cirrhosis is important for prioritizing treatment. (*Id.* ¶¶ 8, 9.)

14 To track the progression of HCV infection, the BOP Manual uses a prisoner’s APRI
15 score, which is determined from the results of two blood tests that measure the AST
16 (aspartate aminotransferase) and platelet counts in the blood and is a less expensive and
17 less invasive means of assessing fibrosis than a liver biopsy. (*Id.* ¶¶ 10, 11.) The Gilead
18 Report also recognizes that the severity of liver disease for people with HCV can be
19 estimated by using the APRI score and the Fibrosis-4 Index. (*Id.* ¶ 12.) Warning signs of
20 liver inflammation can include fatigue, weakness, loss of appetite, nausea, vomiting,
21 jaundice, and discolored feces. (*Id.* ¶ 19.)

22 Those prisoners with “advanced hepatic fibrosis,” liver transplant patients, and
23 those with co-morbid medical conditions are the highest priority (Priority Level One) for
24 treatment. (*Id.* ¶ 13.) Advanced hepatic fibrosis is demonstrated through either an APRI
25 score greater than 2, a “Metavir or Batts/Ludwig stage 3 or 4 on liver biopsy,” or known
26 or suspected cirrhosis. (*Id.* ¶ 14.) Included in the Priority Level One category are prisoners
27 who have received liver transplants, have certain co-morbid medical conditions,
28 immunosuppressed patients, and those who had started treatment when they were

1 incarcerated. (*Id.* ¶ 15.) Priority Level Two is the intermediate priority category and
2 includes those with an APRI score greater than 1.0 and/or stage 2 fibrosis on a liver biopsy²,
3 or have certain co-morbid conditions including liver disease, diabetes, and chronic kidney
4 disease. (*Id.* ¶ 16.) Priority Level Three is the lowest priority for treatment and includes
5 those with APRI scores less than 1.0 or with stage 0–1 fibrosis on a liver biopsy. (*Id.* ¶ 17.)

6 Defendant’s Hepatitis C Committee, which decides whether to treat HCV-infected
7 prisoners with antivirals, has applied additional factors when approving treatment,
8 including the absence of risky behaviors, as evidenced by no disciplinary tickets for drug
9 use or tattoos for one year. (*Id.* ¶ 24.)

10 According to Plaintiff, Defendant has a custom of only considering patients with
11 HCV for treatment via Direct Acting Antiviral medications (DAAs) if their APRI score is
12 2.0 or higher and will not actually treat patients with DAAs unless they also have cirrhosis
13 of the liver.³ (Doc. 22 ¶¶ 15, 16.)

14 **B. Plaintiff’s HCV Treatment**

15 On June 12, 2017, Plaintiff was evaluated by Nurse Practitioner (NP) Baskas for a
16 new diagnosis of HCV, which Plaintiff reported he likely contracted through IV drug use.
17 (Doc. 25 at 3 ¶ 1.) Plaintiff denied any abdomen pain, distention, nausea, vomiting,
18 diarrhea, bilateral lower edema, or jaundice. (*Id.*) His most recent labs, taken in May 2017,
19 showed an APRI score of 0.24. (*Id.*) Plaintiff was educated on avoiding risky behaviors
20 related to HCV, and the plan was to monitor his condition through the chronic care clinic
21 with new labs taken prior to each chronic care appointment. (*Id.*)

22 On November 9, 2017, Plaintiff’s APRI score was 0.41, and he reported that he
23 possibly acquired HCV through drug use or tattoos obtained while in prison. (*Id.* ¶ 2.)
24 Plaintiff reported symptoms of chronic right side upper abdominal pain, swelling, bleeding,
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26 ² Because APRI scores predict the presence of cirrhosis, liver biopsies are not
27 required. (Doc. 25 ¶ 18.)

28 ³ Defendant disputes these statements, but does not set forth the nature of the
disputes or cite any evidence in support of its position. (*See* Doc. 25 ¶¶ 15, 16.)

1 bruising problems, jaundice, leg swelling, fatigue, and loss of appetite. (*Id.*) Upon
2 examination, there was no abdomen tenderness, sclera icteric (jaundice), or peripheral
3 edema noted. (*Id.*) NP Boryczka wrote that Plaintiff was not a candidate for treatment
4 based on his most recent APRI score of 0.41, and the plan was to monitor Plaintiff for
5 complications of HCV and to determine if he was a candidate for HCV treatment. (*Id.*)
6 Boryczka ordered Hepatitis labs, but Plaintiff refused the labs. He wrote on the refusal
7 form that he refused because he was “sick with the flu.” (*Id.*)

8 On May 20, 2018, Plaintiff saw NP Ende, who examined Plaintiff and noted that
9 Plaintiff’s abdomen was non-tender and non-distended and no jaundice was noted. (*Id.*
10 ¶ 3.) Plaintiff’s APRI score was 1.317, and labs were ordered. (*Id.*) The plan of care was
11 to monitor Plaintiff’s APRI score. (*Id.*) Plaintiff asserts in a Declaration that Ende seemed
12 concerned about the escalation in Plaintiff’s APRI score because it “was an indication of
13 reinfection of the HCV.” (Doc. 20 ¶ 22.) Plaintiff told Ende that he had not received any
14 new tattoos, used any drug needles, did not engage in homosexual activity, and that he had
15 just given a clean urine sample on March 23, 2018. (*Id.* ¶ 23.) Plaintiff states that an
16 ultrasound was conducted and, according to Ende, “all checked out well.” (*Id.* ¶ 24.)

17 Plaintiff’s labs were drawn on October 1, 2018 and his APRI score was 0.581.
18 (Doc. 25 at 4 ¶ 4.)

19 Plaintiff states in his Declaration that he believes the HCV “may be taking its toll
20 on [his] liver” because he can think of no other reason why his APRI score would
21 quadruple. (Doc. 20 ¶ 25.) Plaintiff states that the disease significantly affects his daily
22 activities – he can no longer exercise due to fatigue and joint pain, he cannot write for very
23 long due to fatigue, he suffers abdominal pain and loss of appetite, which has resulted in
24 weight loss, and his depression is aggravated by the disease, which led to him being placed
25 on suicide watch in January 2018 for the first time in 10 years. (*Id.* ¶¶ 26-30.)

26 Plaintiff asserts that he is currently not receiving any medication or treatment for
27 his HCV. (Doc. 22 ¶¶ 30, 31.) Defendant disputes these statements, asserting that Plaintiff
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1 “is continuously being evaluated and assessed and his Hepatitis C is continuously being
2 monitored.” (Doc. 25 ¶¶ 30, 31.)

3 **IV. Discussion**

4 **A. Serious Medical Need**

5 There is no dispute that Plaintiff’s HCV constitutes a serious medical need.
6 Moreover, Plaintiff’s treatment and medical records suggest that his condition has been
7 worthy of review or treatment. The Court’s analysis, therefore, will focus on whether
8 Defendant’s response to Plaintiff’s HCV rises to the level of deliberate indifference.

9 **B. Deliberate Indifference**

10 Plaintiff argues that Defendant will only consider treating HCV with DAA
11 medications if the prisoner’s APRI score is 2.0 or higher and the prisoner has cirrhosis of
12 the liver. (Doc. 21 at 3-4.) Plaintiff contends that without receiving the DAAs, his APRI
13 score will continue to rise and he will possibly suffer permanent liver damage. (*Id.* at 5.)
14 Plaintiff argues that the BOP’s guidelines, which Defendant follows, are not “the supreme
15 law of the land” or a doctor’s order, that they are for informational purposes only, and that
16 “treatment decisions are patient specific.” (*Id.*) Plaintiff states that his APRI score
17 quadrupled in a six-month period, even though he did not use drugs, get tattoos, or engage
18 in homosexual activity, and this increase “strongly implies that because he has not received
19 any treatment for HCV, the plaintiff is at a substantial risk of serious harm caused by the
20 disease.” (*Id.* at 6.) Plaintiff argues that the “disease appears to be affecting the Plaintiff
21 seriously for unknown reasons,” which “demonstrate[s] a strong need for immediate
22 treatment with appropriate DAA medications as a ‘patient-specific’ order.” (*Id.*)

23 Defendant argues that since Plaintiff’s June 2017 diagnosis of HCV, the progression
24 of Plaintiff’s disease has been carefully monitored through chronic care labs and chronic
25 care encounters. (Doc. 26 at 8.) Defendant contends that although Plaintiff’s APRI score
26 was “briefly in Priority Level Two,” providers monitored his higher APRI scores and it
27 went down from 1.317 to .581. (*Id.*) Defendant asserts that there is no evidence that
28 Plaintiff suffered any co-morbid condition, no documentation of any warning signs of liver

1 damage, and providers noted the presence of prison tattoos on Plaintiff, which they contend
2 “lower his chances for treatment due to his risky behavior.” (*Id.*)

3 Absent any medical evidence that Plaintiff is likely to suffer serious harm without
4 immediate treatment, Plaintiff fails to create a triable issue of fact that, at this stage,
5 continued monitoring via regular lab tests and chronic care visits while he is at the lowest
6 priority level for HCV treatment amounts to deliberate indifference to a substantial risk of
7 serious harm. Plaintiff has not shown that Defendant’s course of treatment is medically
8 unacceptable or taken in conscious disregard of an excessive risk to his health. Plaintiff’s
9 disagreement with the course of care does not amount to deliberate indifference. *See*
10 *Sanchez v. Vild*, 891 F.2d 240, 242 (9th Cir. 1989) (“A mere difference of opinion does not
11 amount to deliberate indifference to serious medical needs.”). Plaintiff’s speculation that
12 his APRI score will continue to rise and possibly cause permanent liver damage is likewise
13 insufficient to create a genuine issue of material fact that his course of treatment is
14 deliberately indifferent to his serious medical needs. *Caribbean Marine Servs. Co., Inc. v.*
15 *Baldrige*, 844 F.2d 668, 674 (9th 1988) (speculative injury is not irreparable injury
16 sufficient for a preliminary injunction).

17 On the current record, there is no genuine issue of material fact that Defendant’s
18 policy or custom of treating HCV amounts to deliberate indifference to Plaintiff’s serious
19 medical needs. Therefore, the Court will deny Plaintiff’s Motion for Summary Judgment
20 and will Defendant’s Motion for Summary Judgment.

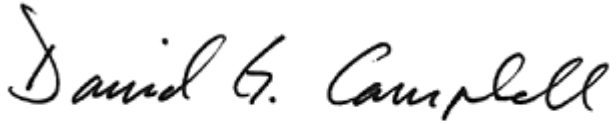
21 **IT IS ORDERED:**

22 (1) The reference to the Magistrate Judge is withdrawn as to Plaintiff’s Motion
23 for Summary Judgment (Doc. 19) and Defendant’s Motion for Summary Judgment
24 (Doc. 26).

25 (2) Plaintiff’s Motion for Summary Judgment (Doc. 19) is **denied**.

1 (3) Defendant's Motion for Summary Judgment (Doc. 26) is **granted**, and the
2 action is terminated with prejudice. The Clerk of Court must enter judgment accordingly.

3 Dated this 20th day of May, 2019.
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7 David G. Campbell
8 Senior United States District Judge
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